No. 13252

United States
COURT OF APPEALS
for the Ninth Circuit

RICHARD C. GILLIS,

Appellant,

vs.

COMPAGNIE GENERALE TRANS-ATLANTIQUE,

Appellee.

BRIEF OF APPELLEE

Upon an Appeal from a Decree of the United States District Court for the District of Oregon, in Admiralty.

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AUTHORITY

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Upon an Appeal from a Decree of the United States District Court for the District of Oregon, in Admiralty.

Appellee has pending before this Court a motion to dismiss this appeal as sham and frivolous, and has been notified by the Clerk that the Court has continued a hearing on that motion until such time as the appeal may be heard on the record, so that both may be considered together. We therefore address this brief to both phases of the case.

MOTION TO DISMISS

Appellant has attempted to bring the case before this Court merely upon the Findings of the Trial Court

and certain exhibits, without any transcript of the testimony. Such a transcript of testimony is essential to any proper consideration of the case. Appellant recognizes this, as is evidenced by his application to the District Court to have the testimony transcribed at government expense, and by his renewal of such application in this Court. The District Court denied the application because he found that there was no "substantial question" involved (R. 27). This Court has likewise denied the application.

There is really nothing before this Court on which it could base a decree. Nor would any remand to the District Court be effectual to accomplish anything, for the District Court, on a hearing of the whole case, has already decided that the ship was neither negligent nor unseaworthy, and that all of libelant's contentions were unfounded. On a remand, it could only reiterate this.

Since this Court has nothing before it on which to base a decree, and since a remand would accomplish nothing, we submit that there is nothing left to do but to dismiss the appeal. Without the transcript of the testimony, this case is like the play of "Hamlet" without Hamlet.

A further reason for dismissing the appeal, beside the technical points urged in our motion, is that the respondent ship was not a party to the Stevedoring Contract, which, it is claimed by appellant, draws in the Safety Code by reference; and even if it had been, this suit is not based on any contract, but on the conventional grounds of unseaworthiness and negligence, as

to both of which the Court has found against appellant. But we reserve a further discussion of this for our argument on appellant's contentions.

DISCUSSION OF APPELLANT'S CONTENTIONS

We were about to entitle this,—"On the Merits". But it would be a misnomer. Lacking the transcript of the testimony, it is impossible to consider this case "on the merits". We therefore adopt the above title.

Appellant contends that the District Court's Findings are not in conformity with the so-called "Safety Code", Libelant's Ex. 4, which is a part of the Pacific Coast Longshore Agreement, Libelant's Ex. 7; and that this agreement is a "labor agreement" to which the shipowner is bound to conform because the shipowner's stevedoring contract, Libelant's Exhibit 5, says in Clause 3 that

> "It is understood and agreed that, in the execution of the work under this contract, the provisions of any *labor agreement* existing between the longshoremen and/or other labor groups and the waterfront employers governing (or in the absence of such labor agreement, any regulations or current practices of the port applicable to) longshore work performed in the ports in the Columbia River District shall be observed." (Italics ours)

We believe the meaning of this clause was explained in the testimony which is missing. Without that testimony this Court is left in the dark. This is but one more illustration of how necessary to a proper consideration of this case is that missing testimony.

It is plain to us that since the libel alleged, as a basis for recovery, "unseaworthiness" and "negligence"; and since the Trial Court, having all the evidence before it, including the Safety Code, as it was interpreted by the testimony, decided against libelant on each of those issues, the case should end here. But since appellant contends that the Court's Findings infringed the Safety Code, and since this Honorable Court has ordered the case to proceed to a hearing, it becomes necessary to consider appellant's contentions.

Since appellant contends that the Court's Findings infringe the Safety Code, the burden is surely on appellant to show that. We submit that he has nowhere done so. Here again it seems to us that we could rest and say no more. But we shall go further; for we believe that, even under the handicap of lacking the testimony, we can show affirmatively, by comparing the Safety Code with the Court's Findings, that the two are in no way inconsistent.

In the first place, it should be noted that the Safety Code is merely an attempt to "apportion" the duties of the ship, stevedore and longshoremen in stevedoring operations. Section II on Page 6 of the Safety Code makes this plain by its heading,—"APPORTIONMENT OF DUTIES", and a reading of its various rules shows that it is, in general, no more than a statement of the maritime law, as applied by the Admiralty Courts to such operations.

The second thing to be noted about the Code is that it is not rigid, but is elastic in its application, and pro-

vides for exceptions as indicated by Rule 102, on Page 5 of the Code.

That Rules is:—

> "Rule 102. The purpose of this Code is to provide minimum requirements for safety of life, limb and health. In cases of practical difficulty or unnecessary hardship an employer or ship may make exceptions from the literal requirements of this Code and permit the use of other devices or methods, but only when it is clearly evident that equivalent protection is provided."

It will thus be seen that the Code is not a hard and fast set of rules, but permits considerable latitude in departing from them as circumstances may require.

We shall now consider Appellant's Points seriatim.

APPELLANT'S POINT I

Brief, P. 20

Appellant objects to this Finding of the Trial Court:

> "Libelant's job was that of hatch tender, known also as signal man and safety man. It was his duty to give the necessary hand signals to the winch driver to raise and lower the cargo lifts, and also to see that the working conditions and lighting were safe for himself and the other longshoremen in his gang." R. 16, (in blue), subpage 3.

This was amply supported by the testimony, but the objection is that it did not conform to the so-called Safety Code. It is hard for us to understand why, when the Code itself expressly provided:

> "Rule 207. The safety duties of the person designated as *hatch tender* or signal man, are:

"(a) To consider himself as the *safety man* for the gang, and for this purpose to cooperate with his foreman or walking boss or other employer representative on the job for the safety of the men during operations.

"(b) To see that all ship's cargo handling gear is at all times properly secured and in apparent safe working condition and that the space over which he has to travel in following the hook is clear of obstructions." (Quoted in Appellant's Brief, Page 22) (Italics ours)

It is undisputed that libelant was the *hatch tender,* and this Rule 207 expressly designates him as the *safety man* for his gang. The Court's Finding merely gave effect to this Rule 207. Even without the testimony it is apparent that this is so. But with the testimony it was clear beyond per adventure. And again we must reiterate that this case was tried, not on the Safety Code alone, but on the *whole evidence,* of which the Safety Code was merely a part.

APPELLANT'S POINT II

Brief, P. 23

Appellant objects to a part of the Court's Finding No. VIII, as follows:

" . . . ; that the longshoremen continued working both before and after the accident under the same lighting conditions for two nights; that the stevedore company had available at the same dock a supply of additional lights that could have been used to supplement the ship's lights if needed, but which were not used; and that the lighting was the same as usually and ordinarily provided for stevedoring work at night."

The point of appellant's objection is that this did not conform to the stevedoring contract, which obligated the steamship company to furnish lights. Brief, Pages 24, 25.

The complete irrelevancy of the objection is shown by the fact that the Court expressly found, on ample testimony, that the ship *did* furnish lights ("the lighting on the deck came from the *ship's regular mast lights* and the string of lights on the dock"); and further found "that the *lighting was adequate and sufficient,* and libelant has not sustained the burden of proof on that claim". (Italics ours) Finding No. VIII, R. 16 (in blue), subpage 4. Also set forth in Appellant's Brief on Pages 10 and 11.

APPELLANT'S POINT III

Brief, P. 25

Appellant objects to the Court's Findings IX, X, XI and XII, on the ground that they conflict with the Safety Code, particularly with Rule 201 that the shipowner shall provide "safe ship's gear and equipment and a safe working place for all stevedoring operations on board ship". Brief, Page 28.

This Rule 201, however, must be read in connection with its immediately following Rule 202. The two together are a general statement of the "APPORTIONMENT OF DUTIES", which is the heading for both of them. We set them forth here:—

"APPORTIONMENT OF DUTIES

"Rule 201. The owners and/or operators of vessels shall provide safe ship's gear and equipment and a safe working place for all stevedoring operations on board ship.

"Rule 202. The employer shall provide, so far as the same shall be under his control, a safe working place for all operations."

Reading these two together, and applying the maxim of *ejusdem generis* to Rule 201, we think they merely mean that the ship shall supply safe "gear and equipment" and a "safe working place" as related to those specific things; but that all details of the work, such as covering hatches, arranging booms, turning on or adjusting lights, building walkways or temporary ladders, shoring up cargo, etc. shall be done by the stevedore. In short, these, and the other many Rules in the Code, merely state the general practice of stevedoring, as amply explained in the missing testimony, and as commonly understood, and in fact as applied generally in the Admiralty Courts.

Appellant says that Findings IX, X, XI and XII infringe these Rules. Let us therefore turn to these Findings.

Finding No. IX relates to thwartships walkways and is as follows:—

"IX.

"The Court finds that it is usual and customary for ships, and particularly foreign ships, to have deckloads of logs stowed in the manner described; *that whether a thrwartships walkway across the*

> *logs for the use of the hatchtender is necessary is a matter determined by the longshoremen themselves, and particularly by the hatchtender; that if such a walkway is needed, the longshoremen build it themselves; that this is a simple task consisting of laying a few planks or dunnage, across the deckload and can be done in a short time by one or two of the longshore gang; that the ship's mate, officers, and crew have nothing to do with the placing or construction of such a walkway;* that the longshoremen worked at #5 hatch and other hatches under similar conditions for two nights without a thwartships walkway; *that a thwartships walkway was not necessary to make the place reasonably safe to work;* that if such a walkway was necessary, *then by custom and practice it was the obligation of the stevedore company, and not the ship, to provide such walkway. The Court finds the ship was not unseaworthy, and its operators were not negligent, in failing to provide a thwartships walkway."* R 16 (in blue), subpage 5. (Italics ours)

This Finding is also set forth on Pages 25 and 26 of Appellant's Brief.

This Finding is not merely amply supported by all the testimony (even by the testimony of libelant's own witnesses, if it were here), but is doubly reenforced by the Safety Code itself. For Rule 811 says:

> "When working cargo over a deckload, a safe walkway from rail to coaming shall be provided for the designated signal man."

It does not say *by whom.* But its context shows that it is the duty of the stevedore, not the ship; for it occurs in a set of rules plainly having to do with the stevedore's functions. Indeed, not merely is Rule 811 a duty of the stevedore, but more particularly it was a

duty of *libelant himself,* as the hatchtender and "safety man" of the gang. Rule 207.

All of the foregoing is clear enough from the internal evidence of the Rules themselves.

The missing testimony, however, made it incontestable and amply supported the Judge's Finding No. IX as above quoted.

Appellant's next objection under Point III is to Finding No. X. Brief, P. 26.

This Finding, which is set forth in the Record at Sub-Pages 4 and 5 of (Blue) Page 16, and again on Pages 26 and 27 of Appellant's Brief, relates to fore and aft catwalks over a deckload and a ladder (from the deck to the deck load).

Inasmuch as the Court expressly found that such catwalks are ordinarily built by the stevedore company only when requested by the ship; and only after all cargo is loaded and the ship is ready for sea; and that such a catwalk would be of no use to the hatchtender going back and forth across the logs; and that such a catwalk was not necessary or usual to make the place reasonably safe; and that "the absence of such a catwalk *had no causal connection with the accident";* and that "the absence of a ladder *had no causal connection with the accident",*—it is difficult to see how this Finding could in anyway infringe the Safety Code, or that it would make any difference even if it did.

Again we say, which cannot be too often repeated, that this Finding is amply supported by the evidence, even by libelant's own witness, the walking boss.

Appellant's next objection is to the Court's Finding No. XI, that the logs were wet, but that there was no proof that they were covered with oil or other foreign substances other than there was some grease on the cable lashings. Sub-Page 6 of P. 16 (blue) of the Record; also Appellant's Brief, P. 27.

Again there is nothing in this Finding that conflicts with the Code, and even if there were, it would not make any difference, because the Court expressly found that there was no proof that libelant fell because he stepped on oil or grease, and found that he fell because a piece of bark came off the log. All, again amply supported by the testimony.

Appellant's last and final objection is to Finding No. XII. This will be found at Sub-Page 6, Page 16 (blue) of the Record, and again at Page 27 of Appellant's Brief. The Finding is:

> "The Court finds that libelant has not sustained the burden of proof that the vessel was unseaworthy, or its operators negligent, or that his accident was caused by unseaworthiness of the vessel or negligence of its operators."

This Finding in no way conflicts with the Safety Code; was amply supported by the evidence, and disposes of the whole case.

To conclude this part of our argument, the Safety Code was only one factor of the case; only one piece of evidence. The most important evidence was that of the witnesses, both for libelant and claimant; for these not only interpreted and explained the application of the Safety Code to longshore operations, but laid before

the Trial Court the whole detail of this accident. And it was on that whole record that the Court based his decision. That record made it plain, not merely that the Safety Code was not infringed, but that the operations were conducted in accordance with the Code, and that libelant slipped because a piece of bark came off a log, and the ship was not negligent or unseaworthy in any way.

THE SHIP WAS NOT A PARTY TO THE CONTRACT

What we have already said disposes of this appeal, and what we now add is, therefore, not really necessary to a decision. But if it were, we point out that this was a suit *in rem,* and the ship, as such, was not a party to any contract, Safety Code or otherwise. Suits in rem are based on a *maritime lien.* No suit in rem can exist unless there is a maritime lien on the ship. Such liens are " '*stricti juris*' and cannot be extended by construction, analogy or inference". Osaka Shosen Kaisha v. Pacific Export Lumber Co. (The Saigon Maru), 260 U.S. 490, 497; 67 L. Ed. 364, 366. The fact that the owner appears and claims the ship never alters the nature of the case; it remains throughout a suit in rem. How then can this ship be bound by any contractual obligation to observe the Safety Code? It is bound only by the maritime law as understood and applied in the Admiralty Courts. We do not think any Safety Code could set that law aside. As a matter of fact, however, in this case that question hardly arises because the Safety Code in general follows the well understood principles of the maritime law.

CONCLUSION

In conclusion, we submit that since, as the Trial Judge has certified, there is no "substantial question" involved in this appeal, it should be dismissed; but if not dismissed, then the decree should be affirmed.

Respectfully submitted,

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